

In the United States Bankruptcy Court

for the

Southern District of Georgia

Savannah Division

FILED

at 2 O'clock & 37 min P  
Date 11/26/03

MICHAEL F. McHUGH, CLERK  
United States Bankruptcy Court  
Savannah, Georgia *MB*

In the matter of:

BARNHILL GENOMICS, INC.

BIOWULF TECHNOLOGIES, LLC

*Debtors*

Chapter 11 Case

Number 02-40426

Jointly Administered

**ORDER ON MOTION TO CONVERT OR DISMISS**

A hearing was held on November 10, 2003, to consider the Motion of the United States Trustee to convert the jointly administered Chapter 11 case of Barnhill Genomics, Inc., and BIOwulf Technologies, LLC ("Debtors") to a Chapter 7. Numerous interested parties were represented at the hearing. The United States Trustee made an oral motion to dismiss and announced that there was no opposition by any party present to dismissal of the case rather than conversion. However, because no notice had been given that the Court would entertain a Motion to Dismiss, I directed notice be given that, absent a written objection, the case would be dismissed on November 17. Accordingly, notice was duly served on November 10, 2003. In response, a timely objection was filed by the law firm of Paul, Hastings, Janofsky & Walker, LLP ("Paul Hastings"), and a conference to consider that objection was convened in my chambers on November 17, 2003.

The full basis for Paul Hastings' objection will not be summarized at length

here, but is instead incorporated by reference to Paul Hastings' Objection to Dismissal of Chapter 11 Proceeding that was filed on November 14, 2003. Suffice it to say that Paul Hastings has standing to be heard in this matter as a creditor entitled to payment of an administrative expense claim.

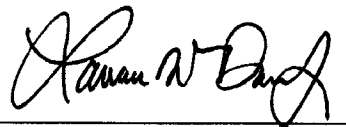
The conversion or dismissal of a Chapter 11 case is governed by 11 U.S.C. §1112(b) which states in relevant part that, "the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter... for cause." Cause may include the ten factors listed in §1112(b). However, courts have universally recognized that the listed items are not exhaustive. *See e.g. Pacific Rim Investments, LLP v. Oriam, LLC (In re Pacific Rim Investments, LLP)*, 243 B.R. 768, 771-2 (D. Colo. 2000). Instead, §1112(b) gives this Court wide discretion to make an appropriate disposition of each case and the ability "to consider other factors as they arise, and use its equitable powers to reach an appropriate result in individual cases." *Albany Partners, Ltd. v. W.P. Westbrook, Jr. (In re Albany Partners, Ltd.)*, 749 F.2d 670, 674 (11th Cir.1984) (*citing* H.R.Rep. No. 595, 95 Cong., 1st Sess. 406 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6362).

Based on the facts of this case, I have concluded that it is not appropriate to convert or dismiss Debtors' case at this time. Paul Hastings and two other professional firms which hold administrative expense claims are the beneficiaries of a "Carve-Out" provision which provided that, to the extent of \$300,000.00, professional fees owed to their firms

would be granted superpriority status over all other claims including the interests of the holders of security interests in certain collateral of the Debtors. Importantly, the superpriority status "Carve-Out" was a bargained for agreement to which the secured creditors consented. It was approved by virtue of this Court's Final Order Approving Debtors Joint Motion dated April 12, 2002, and entered April 16, 2002.

Dismissal of the case would likely have the result of the position of the "Carve-Out" beneficiaries being subordinated to the security interests held by third parties. Thus, Paul Hastings opposes the dismissal of Debtors' case unless such dismissal order protects and preserves the superpriority administrative lien created by the "Carve-Out" provision as to all professionals involved. Of course, the secured creditors favor dismissal as their claim may have priority over those of Paul Hastings under state law.

In consideration of the preservation of the status quo and to accord full effect to the Consent Order entered on April 16, 2002, I conclude that Debtors' case should not be dismissed at this time. The Motion of the United States Trustee is therefore DENIED, without prejudice.



Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 25<sup>th</sup> of November, 2003.